

DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	DATE FILED: October 1, 2019 2:28 PM FILING ID: 5F9A35BFBE582 CASE NUMBER: 2019CV33375
Plaintiff: Harvey Sender, as Receiver for Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC. v. Defendants: Bank of America, N.A., American Express Company, and Discover Bank.	▲ COURT USE ONLY ▲
<i>Attorneys for Defendant American Express Company:</i> John Chanin, #20749 FOSTER GRAHAM MILSTEIN & CALISHER LLP 360 South Garfield Street, Suite 600 Denver, Colorado 80209 T 303.333.9810; F 303.333.9786 JChanin@fostergraham.com	Case Number: 19CV33375 Division Courtroom:
ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT AMERICAN EXPRESS COMPANY	

Defendant American Express Company (“AEC”) submits this Answer and Affirmative Defenses in response to Plaintiff’s *Complaint* (the “Complaint”) filed in the above-captioned civil action.

ANSWER

AEC answers the individually numbered paragraphs of the Complaint as follows:

I. Parties

1. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 1 of the Complaint. Answering further, AEC states that the terms and provisions of the document referenced in paragraph 1 of the Complaint

speak for themselves.

2. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 2 of the Complaint. Answering further, AEC states that the terms and provisions of the document referenced in paragraph 2 of the Complaint speak for themselves.

3. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 3 of the Complaint. Answering further, AEC states that the terms and provisions of the document referenced in paragraph 3 of the Complaint speak for themselves.

4. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 4 of the Complaint.

5. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 5 of the Complaint.

6. AEC admits the allegations set forth in paragraph 6 of the Complaint.

7. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 7 of the Complaint.

8. AEC admits the allegations set forth in paragraph 8 of the Complaint.

II. Jurisdiction and Venue

9. AEC admits the allegations set forth in paragraph 9 of the Complaint.

10. AEC denies the allegations set forth in paragraph 10 of the Complaint insofar as they are intended to refer or apply to AEC. To the extent that such allegations are intended to refer or apply to BOA or Discover, AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 10 of the Complaint.

11. AEC admits the allegations set forth in paragraph 11 of the Complaint.

III. General Allegations

12. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 12 of the Complaint.

13. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 13 of the Complaint.

14. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 14 of the Complaint.

15. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 15 of the Complaint.

16. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 16 of the Complaint.

17. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 17 of the Complaint.

18. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 18 of the Complaint.

19. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 19 of the Complaint.

20. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 20 of the Complaint.

21. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 21 of the Complaint.

22. AEC lacks knowledge or information at this time sufficient to form a belief as to

the truth of the allegations set forth in paragraph 22 of the Complaint.

23. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 23 of the Complaint, with the exception that AEC denies the allegations set forth in the last sentence of paragraph 23, and specifically denies that it was the recipient of any transfers of assets at issue in this action.

24. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 24 of the Complaint.

25. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 25 of the Complaint.

26. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 26 of the Complaint.

27. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 27 of the Complaint.

28. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 28 of the Complaint.

29. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 29 of the Complaint.

30. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 30 of the Complaint, with the exception that AEC specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action.

31. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 31 of the Complaint.

32. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 32 of the Complaint.

33. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 33 of the Complaint.

34. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 34 of the Complaint, with the exception that AEC specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action.

35. AEC denies the allegations set forth in paragraph 35 of the Complaint insofar as they are intended to refer or apply to AEC. To the extent that such allegations are intended to refer or apply to BOA or Discover, AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 35 of the Complaint.

36. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 36 of the Complaint, with the exception that AEC specifically denies the allegation that Shelly Dragul maintained any credit card accounts with AEC.

37. The allegations set forth in paragraph 37 of the Complaint do not purport to refer or apply in any way to AEC, and accordingly no response to such allegations by AEC is required. To the extent that a response is required, AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 37 of the Complaint.

38. AEC denies the allegations set forth in paragraph 38 of the Complaint. Answering further, AEC states that the copy of Exhibit 2 attached to the Complaint as it was served on AEC

is missing page 10 of 10.

39. The allegations set forth in paragraph 39 of the Complaint do not purport to refer or apply in any way to AEC, and accordingly no response to such allegations by AEC is required. To the extent that a response is required, AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 39 of the Complaint.

40. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 40 of the Complaint, with the exception that AEC specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action.

41. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 41 of the Complaint, with the exception that AEC specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action.

42. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 42 of the Complaint, with the exception that AEC specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action.

First Claim for Relief
(Turnover)

43. Answering paragraph 43 of the Complaint, AEC incorporates its responses to the preceding paragraphs of the Complaint as if set forth fully herein.

44. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 44 of the Complaint. Answering further, AEC

states that the terms and provisions of the document referenced in paragraph 44 of the Complaint speak for themselves.

45. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 45 of the Complaint, with the exception that AEC specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action, and accordingly denies that it is in any way obligated to turn over or return any such transfers to the receiver, or is liable to the Receiver on any other basis.

Second Claim for Relief
(Actual Fraud – COLO. REV. STAT. § 38-8-105(1)(a))

46. Answering paragraph 46 of the Complaint, AEC incorporates its responses to the preceding paragraphs of the Complaint as if set forth fully herein.

47. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 47 of the Complaint.

48. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 48 of the Complaint.

49. AEC denies the allegations set forth in paragraph 49 of the Complaint insofar as they are intended to refer or apply to AEC. To the extent that such allegations are intended to refer or apply to BOA or Discover, AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 49 of the Complaint.

50. AEC denies the allegations set forth in paragraph 50 of the Complaint insofar as they are intended to refer or apply to AEC. To the extent that such allegations are intended to refer or apply to BOA or Discover, AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 50 of the Complaint.

Third Claim for Relief
(Constructive Fraud – COLO. REV. STAT. § 38-8-105(1)(b))

51. Answering paragraph 51 of the Complaint, AEC incorporates its responses to the preceding paragraphs of the Complaint as if set forth fully herein.

52. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 52 of the Complaint.

53. AEC denies the allegations set forth in paragraph 53 of the Complaint insofar as they are intended to refer or apply to AEC, and additionally denies that it was the recipient of any transfers of assets at issue in this action. To the extent that such allegations are intended to refer or apply to BOA or Discover, AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 53 of the Complaint.

54. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 54 of the Complaint.

55. AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 55 of the Complaint.

56. AEC denies the allegations set forth in paragraph 56 of the Complaint insofar as they are intended to refer or apply to AEC. To the extent that such allegations are intended to refer or apply to BOA or Discover, AEC lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 56 of the Complaint.

AFFIRMATIVE DEFENSES

AEC asserts its Affirmative Defenses to the Complaint as follows:

First Affirmative Defense

Plaintiff has failed to allege facts with sufficient specificity that, if proven, establish a *prima facie* case for recovery against AEC, and by this failure has failed to state a claim upon which relief may be granted, including, without limitation, any claim for actual fraud under COLO. REV. STAT. § 38-8-105(1)(a).

Second Affirmative Defense

Plaintiff has failed to name, join or serve process upon the correct legal entity or entities that did business with any of the persons or entities in receivership, or that received or benefitted from any transfers of assets at issue in this action.

Third Affirmative Defense

To the extent that AEC received any of the transfers alleged in the Complaint (the “Transfers”), AEC provided reasonably equivalent (if not full, dollar-for-dollar) value in exchange for such Transfers. *See, e.g.*, COLO. REV. STAT §§ 38-8-104, 38-8-109.

Fourth Affirmative Defense

To the extent that AEC received any of the Transfers, AEC took in good faith, provided reasonably equivalent (if not full, dollar-for-dollar) value and/or extinguished an antecedent debt in exchange therefor. *See, e.g.*, COLO. REV. STAT §§ 38-8-104, 38-8-109.

Fifth Affirmative Defense

To the extent that AEC received any of the transfers referenced in the Complaint and AEC was not the initial transferee, Plaintiff cannot recover from AEC because AEC took the transfers for value (the satisfaction of a debt), in good faith, without knowledge of the voidability of the transfers. *See, e.g.*, COLO. REV. STAT §§ 38-8-104, 38-8-109.

Sixth Affirmative Defense

Plaintiff cannot obtain a double-recovery of any transfers that are recovered or determined to be recoverable from any persons or entities in receivership or their insiders, from the beneficiaries of the alleged Transfers, or from any persons or entities other than AEC.

Seventh Affirmative Defense

Any claim by the Plaintiff for recovery of the transfers referenced in the Complaint fails to the extent that such claim is time-barred by the applicable statute of limitation, and/or to the extent that such claim exceeds the reach-back period for avoidance and recovery of such transfers provided under applicable law.

Eighth Affirmative Defense

Plaintiff's claims fail in whole or in part by his failure to join a party without whom the action cannot proceed.

Ninth Affirmative Defense

AEC denies each and every allegation of the Complaint not admitted or otherwise controverted or qualified, and further denies that Plaintiff is entitled to any relief whatsoever from AEC.

Tenth Affirmative Defense

AEC reserves its right to amend its pleading to assert such additional defenses as may arise during the continued course of discovery and investigation in this matter.

WHEREFORE, AEC respectfully requests that the Court enter an Order dismissing the Complaint, including each and every claim set forth against AEC therein, with prejudice, and denying any of the relief sought in the Complaint as to AEC, or that judgment be rendered in favor

of AEC and against the Plaintiff with respect to all matters before this Court, and that AEC be granted such other and further relief as the Court deems just, equitable, and proper.

DATED: October 1st, 2019

FOSTER GRAHAM MILSTEIN
& CALISHER, LLP

/s/ John A. Chanin

John A. Chanin

*Attorneys for Defendant American Express
Company*

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2019, a true and correct copy of the foregoing **ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT AMERICAN EXPRESS COMPANY** was electronically served via Colorado Courts E-File, upon all counsel of record.

/s/ Lucas Wiggins
Lucas Wiggins, Paralegal